

STATINTL

Approved For Release 2002/01/25 : CIA-RDP70-00211R000200020004-2

FILED

Calendar No. 2219

84TH CONGRESS
2d Session
RETURN TO SENATE
FEDERAL REGISTER DIVISION

REPORT
No. 2196

AMENDING THE FEDERAL REGISTER ACT, AS AMENDED, SO AS
TO PROVIDE FOR THE EFFECTIVENESS AND NOTICE TO THE
PUBLIC OF PROCLAMATIONS, ORDERS, REGULATIONS, AND
OTHER DOCUMENTS IN A PERIOD FOLLOWING AN ATTACK OR
THREATENED ATTACK UPON THE CONTINENTAL UNITED
STATES

JUNE 11, 1956.—Ordered to be printed

Mr. McCLELLAN, from the Committee on Government Operations,
submitted the following

REPORT

[To accompany H. R. 10417]

The Committee on Government Operations, to whom was referred the bill (H. R. 10417) to amend the Federal Register Act so as to provide for the effectiveness and notice to the public of proclamations, orders, regulations, and other documents in a period following an attack or threatened attack upon the continental United States, having considered the same, report favorably thereon, without amendment, and recommend that the bill do pass.

PURPOSE

The purpose of this bill is to provide statutory authority for the promulgation, filing, or publication of certain official documents, now required by law to be filed with the Federal Register Division of the National Archives Establishment and published in the Federal Register, in the event of a determination by the President that an attack or threatened attack on the continental United States, by air or otherwise, would make compliance impracticable or would fail to give the public appropriate notice of the contents of such documents.

The bill seeks to accomplish this objective by authorizing the President, after making such determination, to (1) suspend all or part of the legal requirements for promulgating, filing, or publishing such documents; and (2) establish such alternate systems for promulgating, filing, or publishing such documents, including requirements relating to their effectiveness or validity, as may be deemed practicable to provide public notice of the issuance and contents of such documents. In establishing such systems, the President would be authorized to

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JUL 9 1956

provide, without limitation, for the use of regional or specialized publications or depositories for documents, or of the press, radio or similar media of general communication. Suspensions of law authorized would remain in effect until revoked by the President or by concurrent resolution of the Congress, and compliance with the alternate systems would have the same force and effect as filing with the Division or publication in the Federal Register pursuant to existing legal requirements. Finally, if deemed practicable by the President, each agency would be required to preserve the original and two duplicate originals or certified copies thereof of all documents promulgated under such alternate systems, for filing with the Federal Register Division.

BACKGROUND

Under the provisions of the Federal Register Act (44 U. S. C. 301 et seq.), the Administrative Procedure Act (5 U. S. C. 1001 et seq.) and various other statutes and agency and departmental regulations, certain classes of official documents are required to be filed with the Federal Register Division of the National Archives Establishment and published in the Federal Register. These include (1) all Presidential proclamations and Executive orders, except those which are not of general applicability and legal effect, or are effective only against Federal agencies and officers; (2) all documents or classes of documents determined by the President to have general applicability and legal effect; (3) all documents or orders which prescribe a penalty; (4) except to the extent that they require secrecy or relate to the internal management of an agency, all substantive rules and regulations of agencies, and all agency requirements relating to formal and informal procedures; and (5) all documents required to be so published by an act of Congress.

The various statutes concerned make compliance by all executive branch agencies and departments mandatory and, in some instances, make such compliance a prerequisite to the effectiveness of the documents concerned.

NEED FOR LEGISLATION

The need for this legislation arises out of the fact that none of these statutes contain any provisions permitting the suspension of these requirements in an emergency situation in which compliance would be either impossible or impracticable.

In his explanatory statement accompanying the draft bill, the Attorney General points out that—

Conceivably a situation might exist in the United States as a result of an atomic or other attack, by air or otherwise, under which the Archives Building, the Federal Register, and the Government Printing Office would be destroyed and the Government dispersed. Similarly, in a period of threatened attack it might be necessary to disperse the Government, means of communications might be limited, shortages of paper might exist, and the opportunity to continue Government periodicals might be substantially impaired. In such situations two competing considerations would have to be given weight. On the one hand, it would be impracticable to delay the effectiveness or validity of vital

Presidential and other executive and administrative action until filing with the Federal Register Division and publication in the Federal Register could be accomplished. Indeed, such filing and publication might be impossible, or even if possible, means of access to various filed documents, and circulation of the Federal Register, might be so limited as not to constitute an appropriate method of giving notice to the public of the contents of such documents. On the other hand, the public is entitled to reasonable notice of executive and administrative action which, especially in such an emergency, vitally affects it.

The Attorney General observes further that, under a long-standing decision of the Supreme Court of the United States, some form of publication or proclamation is necessary in order for a Presidential proclamation, Executive order or agency rule or regulation to be effective (*Lapeyre v. United States*, 17 Wall. 191, 198-99 (1873)).

Finally, the Attorney General states that, although reliance might be placed on the contention that the Federal Register Act and the Administrative Procedure Act were not intended to be applicable to an emergency situation, and that any reasonable method of publication or promulgation would be effective under such circumstances—

the validity of that contention would be uncertain until finally determined by a competent court. It would be preferable to place the matter beyond doubt by appropriate legislation making it possible to provide alternate systems for publication, promulgation and public availability of official documents.

COMMITTEE ACTION

The committee, in reporting H. R. 10417, considered an amendment to define more clearly what the term "threatened attack" upon the continental United States implied. Although the bill was reported without amendment, members of the committee reserved the right to propose an amendment on the floor of the Senate if, upon further study, it was determined that this authority might be too broad in its application.

AGENCY COMMENTS

Enactment of the pending bill is recommended by the Department of Justice, the Bureau of the Budget, the Office of Defense Mobilization, and the General Services Administration. The comments of the Department of Justice, in submitting the draft legislation, and of the Office of Defense Mobilization and the General Services Administration on S. 3607, an identical measure, follow:

APRIL 6, 1956.

The VICE PRESIDENT,
United States Senate, Washington, D. C.

DEAR MR. VICE PRESIDENT: Attached for your consideration and appropriate reference are copies of a proposed bill, together with accompanying explanation, to amend the Federal Register Act, as amended, so as to provide for the effectiveness and notice to the public

of proclamations, orders, regulations, and other documents in a period following an attack or threatened attack upon the continental United States.

The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

Sincerely,

Attorney General.

EXPLANATORY STATEMENT TO ACCOMPANY BILL TO AMEND THE FEDERAL REGISTER ACT, AS AMENDED, SO AS TO PROVIDE FOR THE EFFECTIVENESS AND NOTICE TO THE PUBLIC OF PROCLAMATIONS, ORDERS, REGULATIONS, AND OTHER DOCUMENTS IN A PERIOD FOLLOWING AN ATTACK OR THREATENED ATTACK UPON THE CONTINENTAL UNITED STATES

The proposed bill deals with the situation which might result from an attack or threatened attack upon the United States which would create conditions making it impracticable to comply with some or all of the provisions of the Federal Register Act, as amended (44 U. S. C. 301 et seq.), and of the Administrative Procedure Act (5 U. S. C. 1001 et seq.), relating to the filing of documents with the Federal Register Division of the General Services Administration and for their publication in the Federal Register. These two enactments and regulations issued pursuant to the Federal Register Act require the filing with the Division and publication in the Federal Register of (1) all Presidential proclamations and Executive orders, except those which are not of general applicability and legal effect or are effective only against Federal agencies or officers, (2) all substantive rules and regulations of agencies, and (3) agency requirements relating to formal and informal procedures.

Section 2 of the Federal Register Act (44 U. S. C. 302) presently seems to require that filing be at the Archives Building in the District of Columbia and neither that act nor the Administrative Procedure Act provides for emergencies under which any of the requirements of filing and publication could be suspended with respect to all or any documents or classes of documents. The purpose of the proposed bill is to deal with such emergencies.

Conceivably a situation might exist in the United States as a result of an atomic or other attack, by air or otherwise, under which the Archives Building, the Federal Register, and the Government Printing Office would be destroyed and the Government dispersed. Similarly, in a period of threatened attack it might be necessary to disperse the Government, means of communication might be limited, shortages of paper might exist, and the opportunity to continue the publication of Government periodicals might be substantially impaired. In such situations two competing considerations would have to be given weight. On the one hand, it would be impracticable to delay the effectiveness or validity of vital Presidential and other executive and administrative action until filing with the Federal Register Division and publication in the Federal Register could be accomplished. Indeed, such filing and publication might be impossible, or, even if possible, means of access to various filed documents and circulation of the Federal Register might be so limited as not to constitute an appropriate method of giving notice to the public of the contents of

such documents. On the other hand, the public is entitled to reasonable notice of executive and administrative action which, especially in such an emergency, vitally affects it. Further, some form of publication or proclamation is necessary for a Presidential proclamation or Executive order or an agency rule or regulation to be effective (*Lapeyre v. United States*, 17 Wall, 191, 198-199).

Although reliance might be placed on the contention that neither the Administrative Procedure Act nor the Federal Register Act was intended to be applicable to an emergency situation such as is contemplated, and that any reasonable method of publication or promulgation would be effective under the circumstances, the validity of that contention would be uncertain until it should be ultimately judicially decided. It would be preferable to place the matter beyond doubt by appropriate legislation making it possible to provide alternate systems for publication, promulgation, and public availability of official documents.

The proposed bill would effectuate this purpose by adding a new subsection, (c), to section 5 of the Federal Register Act (44 U. S. C. 305). That subsection would authorize the President "In the event of an attack or threatened attack upon the continental United States, by air or otherwise," to determine that "as a result of such attack or threatened attack (i) publication of the Federal Register or filing of documents with the Division is impracticable, or (ii) under existing conditions publication in the Federal Register would not serve to give appropriate notice to the public of the contents of documents." These two conditions are believed to cover all of the contingencies referred to above. It should be emphasized that a formal declaration of war would not be necessary so long as the attack or threatened attack upon the continental United States was followed by one of the determinations described above.

The President could thereupon "suspend all or any part of the requirements of law or regulation for filing with the Division or publication in the Federal Register of all or any documents or classes of documents" until such time as he, or the Congress by concurrent resolution, revoked such suspension. The new subsection would be operative "without regard to the provisions of this Act [i. e., the Federal Register Act] or of the Administrative Procedure Act (60 Stat. 237), or of any other provision of law." The Presidential determinations initiating the period of suspension would not be subject to the filing and publication provisions of the Federal Register Act or the Administrative Procedure Act.

The term "document" is defined in section 4 of the Federal Register Act (44 U. S. C. 304) to mean "any Presidential proclamation or Executive order and any order, regulation, rule, certification, code of fair competition, license, notice, or similar instrument, issued, prescribed, or promulgated by a Federal agency." The same section defines the terms "Federal agency" or "agency" to "mean the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government." In view of these comprehensive definitions, the language contained in the proposed bill, which is to be inserted in the Federal Register Act, would cover not only the requirements for

publication and filing contained in sections 2 and 5 of that act (44 U. S. C. 302, 305) but also the similar requirements of sections 3 and 4 of the Administrative Procedure Act (5 U. S. C. 1002, 1003) relating to publication in the Federal Register.

It would be most difficult to conceive in advance of the actual situation what conditions would be like following an attack, or a threatened attack. Accordingly, rather than prescribe a specific system for promulgation and public notice with respect to documents during such a period, the bill would direct the President to "establish such alternate systems for promulgating, filing, or publishing documents or classes of documents affected by such suspensions, including requirements relating to their effectiveness or validity, as may be deemed under the then existing circumstances practicable to provide public notice of the issuance and of the contents of such documents."

The President would be authorized to prescribe alternatives to the present system of filing and publication which might vary in different regions or localities. For example, whether there would be one Federal Register or a number of regional ones would be determined in the light of the situation then existing. Whether there would be one depository for Government documents or a number throughout the country would be determined on the same basis. Similarly, one type of publication might be appropriate for technical regulations of limited interest and different means of providing public notice might be used for documents of more general public interest. In addition, the press, the radio or similar media of general communication could, but need not be, used for the publication or promulgation of documents. The President would be authorized to direct every agency issuing, prescribing, or promulgating documents during a period of suspension to make every effort practicable under the circumstances to provide public notice of its action and of the contents of such documents, and to make copies thereof accessible to the public. Directions could be issued to agencies to take steps to place copies of documents in places like public libraries, city halls, courts, State capitols, etc. No requirement to take any such specific action is contained in the bill because it is not now known whether any single action of this nature would, in fact, be possible and operate to serve the intended purpose. However, the authority to require it would be created. In addition, the agencies would be required to preserve original documents and two duplicate originals or two certified copies thereof for filing with the Federal Register Division when the President determines that it is practicable to do so.

Finally, the bill would provide that "Compliance with such alternate systems of filing or publication shall have the same force and effect as filing with the Division or publication in the Federal Register pursuant to the provisions of this or of any other Act, or of any regulation." In brief, compliance with the directions of the President with respect to the publication, promulgation, and filing of documents would have the same effect as compliance with the Federal Register Act and the Administrative Procedure Act does today, and documents issued, published or promulgated in accordance with such directions would be valid and effective.

AMENDING THE FEDERAL REGISTER ACT

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D. C., April 27, 1956.

Hon. JOHN L. McCLELLAN,
*Chairman, Committee on Government Operations,
United States Senate, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This is in response to your letter relative to S. 3607, a bill to amend the Federal Register Act, as amended, so as to provide for the effectiveness and notice to the public of proclamations, orders, regulations, and other documents in a period following an attack or threatened attack upon the continental United States.

The purpose of the bill is to permit orderly arrangements to be made concerning the promulgation, filing, or publication of documents otherwise required to be filed with the Federal Register Division or published in the Federal Register, such arrangements to be operative in the event of an attack or threatened attack upon the United States, and to assure that documents so filed or published will be valid and effective. The bill authorizes the President, in the circumstances referred to above, to suspend all or any part of the requirements of law or regulation for filing with the Division of the Federal Register or publication in the Federal Register of all or any documents or classes of documents. The objectives of the bill are further described in the explanatory statement transmitted to the Vice President by the Attorney General April 6, 1956, with his letter presenting the proposed bill.

The Bureau of the Budget recommends the enactment of S. 3607.

Sincerely yours,

PERCY RAPPAPORT,
Assistant Director.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF DEFENSE MOBILIZATION,
Washington, D. C., April 26, 1956.

Hon. JOHN L. McCLELLAN,
*Chairman, Committee on Government Operations,
United States Senate, Washington, D. C.*

DEAR SENATOR McCLELLAN: Reference is made to your letter of April 14, requesting information concerning the objectives of S. 3607, a bill to amend the Federal Register Act, as amended, so as to provide for the effectiveness and notice to the public of proclamations, orders, regulations, and other documents in a period following an attack or threatened attack upon the continental United States.

The objectives of the bill are desirable from the defense mobilization viewpoint. There can be little question of the necessity for avoiding any possibility of delaying the effectiveness or validity of Presidential and other executive actions in the event of an enemy attack on the United States or of the desirability of reasonable notice to the public of actions taken. The provisions of S. 3607 appear to afford a satisfactory and desirable means of meeting those objectives under circumstances which would threaten their achievement under normal procedures. The flexible nature of the President's authority under this bill would be particularly desirable because of the great

8

AMENDING THE FEDERAL REGISTER ACT

variety of circumstances with which the President could be faced as a result of enemy attack. Express statutory authority to meet such a situation appears desirable and we would be in favor of enactment of this bill.

The Bureau of the Budget advises that it has no objection to the submission of this report.

Sincerely yours,

VICTOR E. COOLEY,
Acting Director.

GENERAL SERVICES ADMINISTRATION,
Washington, D. C., May 11, 1956.

Re S. 3607.

HON. JOHN L. MCCLELLAN,
*Chairman, Committee on Government Operations,
United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: Your letter of April 14, 1956, acknowledged April 16, 1956, requested a report from GSA on S. 3607, a bill to amend the Federal Register Act, as amended, so as to provide for the effectiveness and notice to the public of proclamations, orders, regulations, and other documents in a period following an attack or threatened attack upon the continental United States.

This bill would amend the Federal Register Act (49 Stat. 501; 44 U. S. C. 305) by authorizing the President to suspend the publication of the Federal Register and establish such alternate systems as may be deemed sufficient to promulgate the information affected by such suspensions. This authorization would go into effect in the event of attack or threatened attack upon the United States, and a determination by the President that (i) the publication of the Federal Register is impracticable, or (ii) that the publication of the Federal Register would not give appropriate notice to the public of the contents of documents.

These suspensions would remain in effect until revoked by the President, or by a concurrent resolution of the Congress.

It is believed that this legislative proposal would meet the requirements for the promulgation of official notification of governmental activities to the public in the event of an armed attack or threatened attack upon the continental United States. Therefore, GSA favors the enactment of S. 3607.

The Bureau of the Budget advises that there is no objection to the submission of this report to your committee.

Sincerely yours,

FRANKLIN G. FLOETE, *Administrator.*

CHANGES IN EXISTING LAW

In compliance with Section 4 of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by this bill are shown as follows (new material is printed in italics, existing law in which no change is proposed is shown in roman):

AMENDING THE FEDERAL REGISTER ACT

SECTION 5 OF THE ACT OF JULY 26, 1955

(40 Stat. 501, 44 U. S. C. 305)

(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided*, That for the purposes of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

(b) In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register.

(c) *In the event of an attack or threatened attack upon the continental United States, by air or otherwise, and a determination by the President that as a result of such attack or threatened attack (i) publication of the Federal Register or filing of documents with the Division is impracticable, or (ii) under existing conditions publication in the Federal Register would not serve to give appropriate notice to the public of the contents of documents, the President may, without regard to the provisions of this Act or of the Administrative Procedure Act (60 Stat. 237), or of any other provision of law, suspend all or any part of the requirements of law or regulation for filing with the Division or publication in the Federal Register of all or any documents or classes of documents. Such suspensions shall remain in effect until revoked by the President, or by concurrent resolution of the Congress. The President shall establish such alternate systems for promulgating, filing, or publishing documents or classes of documents affected by such suspensions, including requirements relating to their effectiveness or validity, as may be deemed under the then existing circumstances practicable to provide public notice of the issuance and of the contents of such documents. Such alternate systems may, without limitation, make provision for the use of regional or specialized publications or depositories for documents, or of the press, the radio, or similar media of general communication. Compliance with such alternate systems of filing or publication shall have the same force and effect as filing with the Division or publication in the Federal Register pursuant to the provisions of this or of any other Act, or of any regulation. With respect to documents promulgated under such alternate systems, each agency shall preserve the original and two duplicate originals or two certified copies thereof for filing with the Division when the President determines that it is practicable to do so.*